lenge." *Id.* at 1139. "Should abuse occur, it may be remedied adequately through as-applied challenges like the Fair's § 1983 claim[.]" *Id.*

Petitioner later sought rehearing or rehearing en banc in the court of appeals, but its petition was denied.[6] *Southern Oregon Barter Fair v. Jackson County, Or.*, 401 F.3d 1124, 1124 (9th Cir. 2005). Judge Berzon, joined by six other members of the court, dissented from the denial of rehearing en banc. *Id.* at 1124-29. She believed that the panel had misread this Court's decision in *Thomas* and that, post-*Thomas*, a deadline for official action was required, even where a content-neutral time, place, and manner regulation was being challenged.

REASONS FOR DENYING REVIEW

A. This case is moot because the possibility that petitioner might once again stage an outdoor mass gathering, and thus be subject to the act again, is no more than speculative.

The last time petitioner applied for a permit to hold an outdoor mass gathering and held such a gathering was in 1996. Since that time it has not applied for a permit and the act has not presented any obstacle to petitioner organizing or holding a mass gathering. (Supp. E.R. 6). In an affidavit filed in the district court, one of the Fair's board members explained that the person who owned the land where the Fair was held in 1996 "was no longer amiable with us" and that the "site was no longer available." (Supp. E.R. 17-18). Since 1996, the Fair has not been able to locate an adequate site. (Supp. E. R. 15-16). A lack of adequate funding also has been

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[6] Petitioner twice suggests that the court of appeals heard this case en banc (Pet. Cert. 1, 4), but that is incorrect.

a significant obstacle to petitioner's ability to conduct another barter fair. (Supp. E.R. 17).

Based on this record, the court of appeals' panel rejected the State's claim that this case is moot. The court agreed that the "proceeding would be moot if the Fair had entirely ceased to operate, left the business, and no longer sought or intended to seek a license." 372 F.3d at 1134 (citation omitted). But the court determined that the Fair had "a sufficient ongoing interest in the outcome of the case to preclude mootness." *Id.* It had not "ceased to exist as a corporate entity," or lost all hope of or interest in holding another gathering. *Id.* Because the court could not "say that there is no reasonable expectation that the state will enforce the Act against the Fair again," the case was not moot. *Id.*

In reaching its conclusion, the court relied heavily on this Court's decisions in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), and *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001). *Id.* at 1133-34. The court seemed to conclude that, under *City News,* this case would be moot only if petitioner had "entirely ceased to operate, left the business, and no longer sought or intended to seek a license." *Id.* at 1134, citing *City News*. The panel, however, misread those decisions.

The court gave an overly-narrow reading to this Court's decision in *City News. City News* was a challenge to a licensing scheme for adult entertainment businesses. 531 U.S. at 281-82. In the midst of the proceeding, the licensee ceased to operate as a business. *Id.* at 283. The licensee argued that the case was not moot because it had never promised not to apply for a new license. *Id.* To resolve the mootness issue, this Court first examined its decision in an earlier case, *City of Erie v. Pap's A.M.* In that case, the licensee sought to have the case declared moot after prevailing in its constitutional challenge to a state statute. The licensee asserted that it had

ceased to operate its business. 529 U.S. at 287. The Court in the *Erie* case concluded that the case was not moot in part because the business "could again decide to operate." *Id.* The Court gave the additional reason that because the licensee had prevailed below, the City of Erie had the ongoing injury of being unable to enforce its ordinance. *Id.* at 288.

In *City News*, this Court clarified that the fact that the business in *Erie* could again have decided to operate was insufficient to establish a live controversy in that case. *City News*, 531 U.S. at 283. As the Court explained, "[t]hat speculation standing alone, however, did not shield the case from a mootness determination." *Id.* It was only because of the additional reason given by the *Erie* court – the city's ongoing injury – that the case presented a live controversy. Thus, *City News* is best read for the proposition that to present a live controversy sufficient to challenge the facial validity of a permitting statute, the person presenting the challenge must demonstrate more than a speculative possibility that the person will reapply for a permit. In *City News*, the Court found that the mere fact that the licensee had not promised not to reapply failed to preserve a live controversy.

In this case, although it appears that petitioner would like to conduct another barter fair, lack of funding, and its failed efforts to find a site over the course of five years, demonstrate only a speculative possibility that another fair ever will take place. Put differently, a party who lacks the practical ability to put on a future event, and who thus lacks any practical reason to reapply for a permit, presents a controversy every bit as speculative as does a plaintiff who lacks a firm intention to reapply. For that reason, this case is moot. That fact, or even the serious possibility that the case is moot, weighs against a grant of certiorari in this case.

B. The state act is not properly subject to a facial challenge.

The court of appeals' panel also rejected the State's claim that the state statutes regulating outdoor mass gatherings are not properly subject to a facial challenge. Although the panel recognized that "[c]ourts generally disfavor facial challenges to legislation," and although it admitted that "[i]t is certainly possible to imagine gatherings that might be subject to the Act but that are purely recreational and devoid of expressive purpose, such as some carnivals, festivals, and exhibitions," it nonetheless held that petitioner could bring a facial challenge because "the statute is broad enough to cover gatherings that are expressive" and because "mass gatherings bear a sufficient nexus to conduct commonly associated with expression." 372 F.3d at 1135, 1136. The panel erred, however.

As a general rule, federal courts will not entertain facial challenges to statutes. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 223 (1990) ("[f]acial challenges to legislation are generally disfavored."); *see also National Endowment for Arts v. Finley*, 524 U.S. 569, 580 (1998). A limited exception to the general rule has been carved out in certain circumstances where First Amendment interests are implicated. *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973). But that exception "is, manifestly, strong medicine that has been employed by the Court sparingly and only as a last resort." 413 U.S. at 613.

This Court's decision in *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 759 (1988), articulated the standard for "distinguish[ing] laws that are vulnerable to facial [First Amendment] challenge from those that are not." In *Lakewood*, the Court held that for a licensing law to be subject to facial invalidation, it must "give[] a government official or agency substantial power to discriminate based on the content or viewpoint of speech," and it "must have a close enough nexus to expression, or to conduct commonly associ-

ated with expression, to pose a real and substantial threat" of censorship. *Id.* As the Court explained, if the law is not directed "narrowly and specifically" at expressive activities, it "provide[s] too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse." *Id.* at 761. Thus, even those laws that provide government officials with unbridled discretion are not subject to facial challenge if they are not specifically directed at conduct commonly associated with expression.

Although the court of appeals may not have misstated these principles, it misapplied them. The state law does not regulate speech or patently expressive conduct. Rather, it applies to large groups of people who congregate overnight in one place. It is true that some such groups may congregate for an expressive purpose, just as people may choose to sit on public streets for an expressive purpose. But such conduct is not patently expressive. Groups of 3,000 or more may congregate overnight for other activities like carnivals, festivals, sporting events, or rodeos. Such events are not commonly considered the type of expressive conduct protected by the First Amendment. *See Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes – for example, walking down the street or meeting one's friends at a shopping mall – but such a kernel is not sufficient to bring the activity within the protection of the First Amendment").[7]

In sum, the court of appeals erred when it concluded that the state law is properly subject to a facial challenge. The court reached that conclusion even though the state law does not

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[7] The court of appeals' panel suggested that "it is not crystal clear whether the purposes of [even] the Fair are expressive." 372 F.3d at 1135.

"give[] a government official or agency substantial power to discriminate based on the content or viewpoint of speech," *Lakewood*, 486 U.S. at 759, and indeed even though the law is both content and viewpoint neutral. And, although the applicable test requires the presence of a "close enough nexus to expression, or to conduct *commonly* associated with expression," *id.* (emphasis added), the court of appeals was willing to find a sufficient nexus based on the mere possibility that the act might affect conduct associated with expression. The court, thus, failed to heed this Court's warning that facial challenges should be employed "sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613. Moreover, even if the panel ultimately was correct in deciding that a facial challenge can be brought here, the strong possibility that it was not correct is a factor that cautions against granting the petition.[8]

C. On the merits, the court of appeals reached the right result.

The principal claim made in the petition, and in the opinion dissenting from the denial of rehearing en banc, is that the panel erred in holding that, at least post-*Thomas*, a content-neutral

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[8] The fact that the state law is not properly subject to a facial challenge does not leave those to whom the law is applied without remedies, as petitioner's as-applied challenge demonstrates. Remedies, in particular a circuit court mandamus proceeding, also are available to force a possibly recalcitrant local government to act on an application for a permit. *See* Or. Rev. Stat. § 34.105-.240 (regarding mandamus procedure). The court of appeals' dissenting opinion suggests that obtaining relief in mandamus "requires proof of illicit motive," 401 F.3d at 1127, but that is incorrect, at least under Oregon law. Under state law, a writ of mandamus may be issued "to compel the performance of an act which the law specially enjoins." Or. Rev. Stat. § 34.110. There is no "illicit motive" requirement.

time, place, and manner restriction need not include the *Freedman* procedural safeguards, and specifically that such a regulation need not contain a deadline for official action on a permit application. (Pet. Cert. 1, 4); 401 F.3d at 1125 ("My central quarrel with the panel's decision is its fundamental misreading of *Thomas*"). According to the dissent from the denial of rehearing en banc, the requirement of a deadline for official action on a permit application is not a *Freedman* procedural safeguard, but instead an aspect of "*Thomas's second* holding: whether [the state act] 'contain[s] adequate standards to guide the official's discretion and render it subject to effective judicial review.'" 401 F.3d at 1125-26, quoting *Thomas*, 534 U.S. at 323 (emphasis in court of appeals' opinion).

However, it is the decision dissenting from the denial of rehearing en banc, not the panel decision, that is incorrect. This Court consistently has treated the requirement of a prompt official decision as a part of the *Freedman* procedural safeguards. *See Thomas*, 534 U.S. at 321 (among the procedural safeguards required under *Freedman* are the requirement that "any restraint prior to judicial review can be imposed only for a specified brief period") (internal quotation marks and citation omitted); *FW/PBS, Inc. v. Dallas*, 493 U.S. at 226 (a prior restraint that fails to place limits on the time within which the decisionmaker must act is impermissible, citing *Freedman*) (O'Connor, J., joined by Stevens and Kennedy, JJ.), *id.* at 240 (state "must provide that the licensor will, within a specified brief period, either issue a license or go to court") (Brennan, J., joined by Marshall and Blackmun, JJ.) (citations and internal quotation marks omitted); *Riley v. National Federation of Blind*, 487 U.S. 781, 802 (1988) (a licensing regulation "must provide that the licensor 'will, within a specified brief period, either issue a license or go to court,'" quoting *Freedman*, 380 U.S. at 59).[9]

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[9] Petitioner relies on *City of Littleton v. Z.J. Gifts D-4*, 541 U.S. ___, 124 S. Ct. 2219, 159 L. Ed. 2d 84 (2004), contending that it

Thus, contrary to the position taken by the court of appeals' dissenting opinion, the requirement of a prompt official decision made in response to a permit application *is* part of the trio of *Freedman* procedural safeguards. This Court has said so repeatedly.

And this Court was unequivocal in *Thomas*, holding that "*Freedman* [was] inapposite because the licensing scheme at issue [in *Thomas*] is not subject-matter censorship but content-neutral time, place, and manner regulation[.]" 534 U.S. at 322. That is, this Court "ha[s] never required that a content-neutral permit scheme regulating speech * * * adhere to the procedural requirements set forth in *Freedman*." *Id.* (footnote omitted). Thus, it is the court of appeals' dissenting opinion, not the panel decision, that misreads *Thomas*.

D. There is no inter- or intra-circuit split with regard to the meaning and effect of this Court's decision in *Thomas*.

Petitioner indicates that there is a conflict between the panel decision in this case and "other interpretations of the *Thomas* decision within the Ninth Circuit." (Pet. Cert. 8). For the other side of this supposed conflict, he impermissibly relies, however, on an unpublished court of appeals' decision, which also is so terse as to be almost completely uninformative. *See* Ninth Circuit Rule 36-3 (unpublished dispositions are not binding precedent and may not be cited to the court or by the courts of the circuit, except in certain limited circumstances, none of which

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"directly points to a result different from that achieved by the panel" (Pet. Cert. 7), but that decision is not to the contrary. In that case, as well as those cited above, this Court said that among the *Freedman* procedural safeguards was the requirement of "strict time limits leading to a speedy administrative decision and minimizing any 'prior restraint'-type effects." *Id.*, 159 L. Ed. 2d at 91.

applies here); *THG Enterprises Inc. v. City of El Cajon*, 60 Fed. Approx. 711 (9th Cir. 2003).[10] In fact, there is no intra-circuit conflict as to the meaning and application of *Thomas*.

There also is no inter-circuit conflict. Instead, every federal court of appeals that has considered the issue post-*Thomas* has agreed with the panel decision in this case and has held that the *Freedman* procedural safeguards, which include the requirement of a prompt official decision on a permit application, do not apply to content-neutral time, place, and manner regulations. *See New England Reg.Council of Carpenters v. Kinton*, 284 F3d 9, 21 (1st Cir 2002) (in *Thomas*, "the Court clarified that *Freedman*'s procedural requirements do not apply to permit schemes that eschew any consideration of the content of speech"); *Utah Animal Rights v. Salt Lake City Corp.*, 371 F.3d 1248 (10th Cir 2004) (that case was "not governed by *Freedman* and its progeny, which apply to content-based licensing or censorship schemes, but by *Thomas*"); *Granite State Outdoor v. City of Clearwater, Fla.*, 351 F.3d 1112, 1118 (11th Cir 2003) ("time limits are required when their lack could result in *censorship* of certain viewpoints or ideas, *see e.g., Freedman*, but are not categorically required when the permitting scheme is content-neutral," citing *Thomas*) (emphasis in original); *Griffin v. Secretary of Veterans Affairs*, 288 F.3d 1309, 1328 (Fed.

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[10] On page 9 of the petition, in the middle of the page, petitioner appears to be quoting from the court's published decision in *Lombardo v. Warner*, 353 F.3d 774 (9th Cir. 2003). But petitioner actually still is quoting from the unpublished decision in *THG Enterprises*. In any event, the panel decision in *Lombardo*, which is not contrary to the decision in this case, was withdrawn when the case was accepted for rehearing en banc. *Lombardo v. Warner*, 371 F.3d 538 (9th Cir. 2004). The court later certified questions of state law to the Oregon Supreme Court. *Lombardo v. Warner*, 391 F.3d 1008 (2004). The certified questions are before that court now.

Cir.), *cert. denied* 537 U.S. 947 (2002) ("Few cases invoke the requirement for procedural safeguards unless an explicit censorship scheme – which by definition is not content-neutral – is under attack, and the Supreme Court recently has confirmed that the procedural safeguards doctrine is so limited in scope," citing *Thomas*).

Thus, there is no inter-circuit conflict that might command this Court's attention. Instead, with the exception of the dissenting opinion in the Ninth Circuit, there is a pool, if not yet a lake, of uniformity and common understanding. There is relatively little reason in this situation for the Court to step in now, if it ever needs to do so. The issue can be left to percolate longer in the lower courts.

That is particularly true here because the issue of the meaning of *Thomas*, and whether, post-*Thomas,* a content-neutral time, place, and manner regulation must contain a deadline for official action, is almost certain to be before the Ninth Circuit again when *Lombardo v. Warner* returns from the Oregon Supreme Court. That case deals with permits to erect certain signs visible from state highways. *Lombardo v. Warner,* 353 F.3d 774, 775-76 (9th Cir. 2003), *opin. withdrawn, en banc review granted,* 371 F.3d 538 (9th Cir. 2004). Among the issues that are before the court of appeals in the case is whether a provision of the act under scrutiny there, which provides for a variance from certain provisions of the act, but which contains no deadline for official action on a request for a variance, violates the First Amendment "because it contains no time limit within which the [state] Department must act on an application for a variance." *Lombardo v. Warner*, 391 F.3d 1008, 1009 (9th Cir. 2004). In support of that constitutional claim, Lombardo, like the petitioner here, cites and relies on *Freedman* and its progeny. *Id.* Before addressing Lombardo's claim that the lack of time limits amounts to a constitutional flaw, the Ninth Circuit has asked the state court whether, when a state statute contains no express

time limitation, state law may otherwise supply some time limitation. *Id.* at 1010. After the state court answers that question, the constitutional question will be back before the en banc federal court. There thus is little reason for this Court to take the issue up now. Petitioner here was unable to obtain en banc review in the court of appeals, but the en banc court eventually will confront in *Lombardo* the same issue petitioner raises.

CONCLUSION

This court should deny the petition for a writ of certiorari.

Respectfully submitted,

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(3)

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In the Supreme Court of the United States

SOUTHERN OREGON BARTER FAIR,
Petitioner,

v.

STATE OF OREGON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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1. NEW ISSUES PRESENTED IN BRIEF OF RESPONDENT STATE OF OREGON IN OPPOSITION

In opposition to this Court's grant of Petitioner's Writ of Certiorari, Respondent raises two new issues:

A. This case is moot because it is no more than speculative that Petitioner will be able to stage another mass gathering, and thus be subject again to the state statutes that apply to outdoor mass gatherings.

B. The state's Mass Gathering Act is not subject to facial challenge because the statutes lack a close enough nexus to expression or to conduct commonly associated with expression.

Respondent's suggestion this Court allow the issue to percolate in the lower courts because the decision in Thomas is relatively new[1] lacks both reason and dignity. Petitioner further addresses this collateral suggestion, in part, within Petitioner's Reply to the two issues mentioned above. Respondent also suggests this Court delay hearing this issue because there is no intra- circuit or inter-circuit split over the meaning in Thomas. (Page 12-15, Brief of Respondent.) This statement is a misstatement of law, as presented in Petition as well as in the Ninth Circuit's Dissent Opinion to the Order

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[1] Question No. 4, Page I, and Page 14, Brief of Respondent. Thomas refers throughout to Thomas v. Chicago Park Dist, 122 S Ct. 775, 534 U.S. 316, 151 L Ed.2d 783 (2002).

Denying En Banc[2]. Petitioner will resist the temptation to repeat what has already been briefed, in the interest of brevity, and respect.

A. The Question Of Mootness

Respondent's pursuit of this issue is replete with obfuscation, misdirection, and mischaracterization of law and fact in a weak attempt to distract this Court's attention from the vital issues properly before this Court. Distilled to its essence, Respondent State of Oregon is asking this Court to allow an unconstitutional prior restraint, susceptible to government sponsored censorship of ideas, to persist because of this extraneous irrelevant question - which has no basis in fact. Petitioner Corporation is sound, current, and actively seeking new land. Minor other events have occurred under the corporate name.

The Ninth Circuit's three-judge panel declined to find this case moot, stating:

> The state contends that the possibility that the Fair will actually obtain funding and a site is speculative. On this record, however, we cannot conclude that the barriers to the Fair's staging another event are "insurmountable" and therefore enough to moot the case. Here, as in Clark, the Fair's "stated intention to return to business if the[statute] is declared unconstitutional," together with the ongoing efforts the Fair has made to arrange another gathering, sufficiently distinguish it from the plaintiff in City

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[2] Southern Oregon Barter Fair v. Jackson County, Oregon, 401 F.3d 1124, 1126-27 (2005).

> News. We cannot say that there is no reasonable expectation that the state will enforce the Act against the Fair again. (Southern Oregon Barter Fair v. Jackson County, Oregon, 372 F.3d 1128,1134 (C.A.9 (Or.),2004.)

Respondent State of Oregon assumes facts not in evidence when it disparagingly characterizes Petitioner, and Petitioner's event, as speculative. There is nothing in the record - excepting Respondent's own self-serving, conclusory remarks - upon which to base such a premise. In fact, Respondent is speculating about the status of Petitioner and future or current events. The Ninth Circuit's panel was correct: "On this record, however, we cannot conclude that the barriers to the Fair's staging another event are 'insurmountable' and therefore enough to moot the case." (Id.)

In no other instance has this court raised the issue of recurrence as a prerequisite against mootness, and for review. Consider: Forsyth County Georgia v. Nationalist Movement, 505 U.S. 123 (1992), Ward v. Rock Against Racism, 109 S Ct 2746, 491 US 781 (1989), Frisby v. Schultz, 487 US 474, 108 S Ct 2495, (1988), Shuttlesworth v. City of Birmingham, 394 US 147, 89 S Ct 935, 22 L Ed2d 162 (1969), and even Thomas v. Chicago Park Dist, 122 S Ct. 775, 534 U.S. 316, 151 L Ed.2d 783 (2002) itself. Nowhere was there a suggestion any of the parties contesting the licensing scheme would have to prove they were going to conduct a future event. Merely that they were still active, still in existence, and still a party to the action. (See, Arizonans for Official English v. Arizona, 520 U.S. 43, 48, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997), where Party bringing suit no longer government employee, thereby no longer having standing to continue suit.)

Respondent provides no authority for the extreme position taken to dismiss this action, and no authority how this action differs from those cited above. It is Respondent State of Oregon who misconstrues the applicability of City of Erie v. Pap's A.M., 529 US 277 (2000), and City News & Novelty, Inc v. City of Waukesha, 531 US 278 (2001). In each case, the license was prospective - forward looking to an established ongoing business. This instance is retrospective for an event that occurred, without the permit application signifying any future expectations. In this manner of application, Petitioner is similar to those parties referenced above, and dissimilar to PAP's A.M. and City News & Novelty. Prior activity in the arena is sufficient to maintain standing so long as it does not become impossible to conduct another event. "'The underlying concern is that, when the challenged conduct ceases such that there is no reasonable expectation that the wrong will be repeated, then it becomes impossible for the court to grant any effectual relief whatever to the prevailing party.' City of Erie, 529 U.S. at 287, 120 S.Ct. 1382." (Barter Fair, Supra, at 1133-34.) The Ninth Circuit Panel also correctly announced, "The party asserting mootness bears the burden of establishing that there is no effective relief remaining that the court could provide." (Id., 1134.)

The State's position has remained consistent throughout these many years – Respondent is unconcerned about the constitutionality of its Mass Gathering Act. For the many years subsequent to the District Court's Preliminary Injunction holding Oregon's Mass Gathering Act unconstitutional on its face, prior to Thomas, the State failed to conform to the District Court's Holding. Perhaps had the State chose to amend or repeal its statute to conform to First Amendment jurisprudence, the issue would be moot. But even then the state would have the "heavy burden of persuading"

the court that "subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189-90 (2000).

Ultimately, it can be said the State of Oregon is hoping this Court will disagree with the views of Petitioner sufficient to ignore an unconstitutional permit scheme. And this underlies Respondent's motive in raising such indefensible grounds upon which to decline Certiorari.

B. The Question of a Facial Challenge

As an initial matter, it is important for Respondent to appreciate the full text of the First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or **the right of the people peaceably to assemble**, and to petition the Government for a redress of grievances. (Emphasis added.)

The right of the people to peaceably assembly is implicated in all gatherings (congregations according to Respondent – See Page 9, Brief of Respondent), particularly those on private land, espousing cultural and religious expression. (See, Infra.)

Respondent State of Oregon assumes facts not in evidence when it disparagingly characterizes Petitioner, and Petitioner's event, as not expressive. There is nothing in the record - excepting Respondent's own self-serving, conclusory remarks - upon which to base such a premise. Indeed, although Respondent asks this Court to find as irrelevant the

"tumultuous 1996 permit application process"[3], it is well known to Respondent that Petitioner's favorable verdict in the companion § 1983 action against Jackson County, including a $25,000 punitive damage award against the Jackson County Sheriff, was based entirely upon the County Defendants' animus toward the event and its attendees - originating precisely from a disagreement with their expressive conduct![4] The Ninth Circuit three Judge panel described the event: "The Fair describes its event as a religious gathering, a 'harvest celebration and gathering of ... 'new age,' 'back-to-the-land' hippies and friends,' and a 'counterculture crafts fair' where artisans and vendors set up booths for people to buy crafts." (Barter Fair, Supra., at 1130. Emphasis added.)

Moreover, when Respondent suggests this Court pass over this case and direct its attention to what it believes is a more worthy upcoming Ninth Circuit case, one can only conclude Respondent's subtext to this Court includes a reference that this Petitioner's people aren't as good as the other Petitioner's

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[3] at Footnote 2, Brief for Respondent.

[4] Respondent's contention that the statute is constitutional because, as Petitioner's civil action demonstrated, the courts provide a remedy, is misplaced and misconstrued. (Footnote 8, Brief of Respondent.) Respondent is saying that only those applicants with sufficient resources to hire an attorney to force the governing body to abide by the First Amendment may enjoy the protections of the First Amendment. This is not what the First Amendment says. Its text is: "Congress shall make no law abridging the right." Through the Fourteenth Amendment, Oregon's Mass Gathering Act abridges the right, and shall not persist.

people.[5] Suggesting this Court could withhold ruling on this issue, with this Petitioner, because the issue is brewing in another Ninth Circuit case, with people whose views are more palatable to us good people, reveals Respondent's own animus to the expression of Petitioner; while welcoming, and assuming, this Court will do the same. It is difficult to imagine another reasoning behind asking this Court to wait for another case in order to rule on an issue so vital to First Amendment jurisprudence[6].

Respondent fails to appreciate what grave harm the absence of a reasonable time frame within which to review an application for permit does to the free and uncensored expression of speech and assembly. Preventing government bodies from possessing the discretion to approve or not

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[5] At pages 13 - 15, including fn 10, Brief for Respondent, Respondent invites this Court to withhold ruling on this case because the issue is coming up in Lombardo v Warner, 353 F3d 774 (9th Cir 2003), *opin. withdrawn, en banc review granted*, 371 F3d 538 (9th Cir. 2004), currently before the Oregon Supreme Court on certified questions from the Ninth Circuit. (391 F3d 1008 (9th Cir. 2004).) Petitioner notes Respondent's characterization of the two cases is misleading. At Page 14, Brief for Respondent, Respondent avers, "Lombardo, like the Petitioner here, cites and relies on Freedman and its progeny." Petitioner here expresses no such reliance in the Petition for Certiorari. Rather, Petitioner argued the sort of unbridled discretion infecting the Oregon Act by not requiring a time frame for review, is of the type this Court held to remain outside Constitutional permissibility, apart from the Freedman safeguards extolled in Thomas.

[6] The only other explanation fathomable is a thinly veiled attempt by Respondent to trick this Court. It is no great leap to conclude once this Court declines Certiorari, Respondent would use that Decision to enhance its position in Lombardo.

approve a license to exercise one's freedom of speech and assembly is precisely what the language of the First Amendment was designed to accomplish. In this analysis, Petitioner is aided by counsel's recent reading of Professor Laurence Tribe's Reply to Justice Scalia's analysis of the Supreme Court's Holding in Church of the Holy Trinity v. United States, 143 US 45- (1892)[7]. At Page 92, Professor Tribe describes why the statute in question may be struck as unconstitutional - not for what it says, but for what it does not say:

> If Congress had said, in so many words, "secular lecturers are exempt, but those whose lectures take the form of religious sermons are subject to the ban," would that not have constituted an abridgement of the freedom of speech and of the free exercise of religion - in violation of the First Amendment? Understood as stating a principle against content-based censorship and a mandate of governmental neutrality with respect to religion, the First Amendment would have condemned so discriminatory a federal enactment.

Similarly, if the Oregon Legislature had said, in so many words, "the governing body has the discretion to let languish for as long as it chooses an Application for Permit before determining whether 'the organizer demonstrates compliance or the ability to comply with the health and safety rules governing outdoor mass gatherings'"[8], would that not have constituted an abridgement of the freedom of speech in

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[7]Antonin Scalia, A Matter Of Interpretation, Federal Courts and the Law 92 (Amy Guttman ed. 1997.)

[8] ORS 433.750(1).